No. 17-530

IN THE

Supreme Court of the United States

WISCONSIN CENTRAL, LTD,
GRAND TRUNK WESTERN RAILROAD COMPANY AND
ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities.[1] AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of industry-wide significance, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies, and the courts.

This case, which raises the question whether stock received by railroad employees is subject to payroll taxes levied under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241, presents such a matter of industry-wide significance. Taxes represent one of the largest expense for railroads. In 2016, the railroad industry paid approximately $12 billion in taxes, which included nearly $2.5 billion in payroll taxes. Ass'n. of Am. R.R., *Railroad Facts* 16 (2017 ed.). AAR routinely represents the railroad industry in tax-related matters before the courts and regulatory bodies, such as the Internal Revenue Service and the Railroad Retirement Board. AAR has filed *amicus* briefs with appellate courts and this Court in a number of important tax cases affecting the railroad industry (*e.g.*, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277 (2011); *BNSF Ry. Co. v. United States*, 745

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[1] Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

F.3d 774 (5th Cir. 2014) (in support of petition for rehearing)). Because of the importance of the issue raised in this case, AAR participated as *amicus curiae* in the recent Seventh and Eighth Circuit cases raising the same issue, and filed an *amicus* brief with this Court in support of the *certiorari* petition in this case.

Here, the Court of Appeals issued an expansive interpretation of the term "compensation" under the RRTA which cannot be squared with the text, purpose, or history of the Act. The Court held that almost anything with market value is a "form of money remuneration," and thus subject to RRTA payroll taxes. This decision imposes a significant tax on non-money remuneration that Congress plainly did not intend to tax.

Thus, the question presented by this case has implications not just for Petitioners, the U.S. subsidiaries of Canadian National Railway Company, and their employees. It impacts all railroads in the United States that offer, have offered, or are contemplating offering stock to some of their employees. Therefore, all of AAR's members have a direct and significant interest in the issue before this Court.

SUMMARY OF THE ARGUMENT

The decision below should be reversed because it erroneously interprets the term "compensation" under the RRTA to include stock. The RRTA levies payroll taxes on "compensation" paid by railroad employers, and received by railroad employees, to fund benefits provided under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v. Compensation is defined as "any form of money remuneration." The Government contends that compensation should be interpreted to mean the same thing as the term "wages," used in the

Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*—the statute that funds Social Security benefits—even though "wages" are specifically defined as "all remuneration." The language used in the RRTA shows that Congress intended that the tax base for funding railroad retirement benefits was meant to be narrower than the tax base for funding Social Security benefits, and does not include stock.

The RRA and the Social Security Act (SSA) serve the same general purpose. However, they differ in a number of significant ways. The RRA provides two tiers of benefits: the first tier provides benefits that are essentially equivalent to Social Security benefits; the second tier provides retirement and other benefits that are not available to Social Security beneficiaries. To fund RRA benefits, the RRTA levies two tiers of payroll taxes on railroad employers and employees. The first tier of taxes is equivalent to the taxes Social Security employers and employees pay, but the second tier of taxes is paid only by railroad employers and employees. Another difference, which has been in the statutes from the beginning, is the definition of "compensation" and "wages."

In the wake of the great depression of the 1930s, Congress enacted both the SSA and RRA. The latter was railroad-specific legislation intended to address the particular circumstances of the railroad industry at the time. Among other things, the railroad retirement system was designed to address a pension crisis facing the railroad industry, which was the only industry that was already providing pensions to employees. In crafting the RRTA, Congress clearly made the choice to use the term "compensation" rather than "wages," and further, defined compensation differently

than wages, using narrower language that mirrored how railroad pensions were funded at the time. Congress did not intend to tax all forms of remuneration that a railroad employer could confer on its employees.

Creation of the railroad retirement system was neither the first, nor the last, time that Congress chose to enact railroad-specific legislation to address a subject differently for railroads than for other industries. Congress has done so in the areas of economic regulation (including tax policy), safety and employer liability, and labor relations. Thus, it should be no surprise that Congress chose to address the subject of retirement income security differently for the railroad industry and, more specifically, that it chose a different method for levying the payroll taxes that fund RRA benefits.

ARGUMENT

I. STOCK DOES NOT FALL WITHIN THE DEFINITION OF COMPENSATION UNDER THE RAILROAD RETIREMENT TAX ACT.

The issue presented here is the meaning of the term "money remuneration" used in the definition of "compensation" under the RRTA, and specifically, whether stock granted to employees falls within that term. 26 U.S.C. §3231(e)(1).

While money remuneration in the form of salaries and bonuses constitutes the core of a railroad employee's total compensation, other tools are used by railroad employers to reward and incentivize employees. One such tool is stock, which may be transferred to employees pursuant to nonqualified stock options, such as those involved in this case. Remuneration of this nature is deemed valuable because it gives

employees a direct stake in the company's fortunes, a point acknowledged by the court below. Pet. App. 3a. Indeed, Congress has sought to encourage employee ownership of employer stock, which is seen as a "device for expanding the national capital base among employees—an effective merger of the roles of capitalist and worker." *Donavan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). *See* Pet. Br. at 12-13 for an explanation of the stock option program used by Petitioners, Canadian National's U.S. subsidiaries. All the large railroads utilize or have utilized stock options similar to Canadian National's program at issue in this case.

Arguing that stock transferred pursuant to nonqualified stock options is subject to payroll taxes, the Internal Revenue Service equates the term "compensation" used in the RRTA with the term "wages" used in FICA. 26 C.F.R. §31.3231(e)-1. But the words used in FICA to define "wages" are very different from the words used in the RRTA to define "compensation." FICA levies payroll taxes on "wages," which is defined as "*all remuneration* for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. §3121(a) (emphasis supplied). In contrast, the RRTA defines "compensation" as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. §3231(e)(1) (emphasis supplied). Thus, the IRS's position that stocks are "money remuneration" derives from its decision, reflected in a 1994 regulation, to interpret very different language, used in different statutes, as if it meant the same thing. *See* Pet. Br. at 47 (noting that until 1994, the IRS interpreted "compensation" in the RRTA as "remuneration in money").

While not purporting to rely on the IRS regulation, the court below reached the same conclusion. Pet. App. 1a – 13a.[2] The court conceded that stocks may not have been considered money when the RRTA was enacted. Pet. App. 4a. But it dismissed the possibility that when Congress used the term "money" to define railroad employees' compensation it intended that what was considered "money" when the RRTA was enacted would continue to be the basis for defining the compensation that would be subject to payroll taxes in the future. When the history and purpose of the RRTA and RRA are examined it becomes clear that that is precisely what Congress intended. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute").

A. The Railroad Retirement System and Social Security System are Different in a Number of Ways, Including the Manner in Which the Payroll Tax is Levied.

The court below observed that "'[t]he Railroad Retirement Tax Act . . . is to the railroad industry what

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[2] In reaching the same outcome as the Seventh Circuit, the Fifth Circuit granted deference to the IRS's interpretation under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755-56 (5th Cir. 2015). On the other hand, when the Eighth Circuit addressed this issue, it concluded that "FICA sweeps more broadly than the RRTA," and, applying the "ordinary common meaning of" the term, held that "stocks . . . are not 'money'" and, therefore, that "the RRTA unambiguously does not require payment of RRTA taxes on remuneration in stock." *Union Pac. R.R. v. United States*, 865 F.3d 1045, 1048-53 (8th Cir. 2017).

the Social Security Act is to other industries.'" Pet. App. 2a. The railroad retirement system and Social Security system address the same general subject—retirement income security. Both systems have two statutory components: a statute that provides benefits, and a statute that funds those benefits. However, as a result of deliberate choices made by Congress they are distinct retirement systems that have taken different legislative paths, and that differ in significant ways.

The RRA, which initially provided basic retirement benefits and a very limited disability benefit, has been adjusted and expanded on numerous occasions since 1937. In 1938, an unemployment benefit was introduced. In 1946, the system was expanded to include survivor benefits, sickness benefits and an occupational disability benefit; the latter provides a benefit to employees suffering a disability that prevents them from performing their regular railroad job. 45 U.S.C. §231a(a)(1)(iv). Spousal benefits were added in 1951. *See* Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bulletin, No. 2, at 42 (2008). The Railroad Retirement Board, an independent agency in the executive branch of the federal government, has as its sole function administration of the railroad retirement system. 45 U.S.C. §231f.

In the early 1970s, a combination of inflation and past benefit increases raised concern in Congress over the future of the railroad retirement system and led to the creation of a commission to conduct a study and recommend changes to Congress "that would ensure adequate benefit levels on an actuarially sound basis." R.R. Ret. Bd., *Railroad Retirement Handbook,* at 3-4 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015

%29.pdf). Ultimately, this resulted in enactment of the Railroad Retirement Act of 1974, which "fundamentally restructured" the railroad retirement system, primarily by splitting benefits into two distinct parts and eliminating the provisions which allowed retirees who qualified for both railroad retirement and Social Security benefits to receive benefits from both systems. *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 168-69 (1980).

Today, the RRA provides two tiers of benefit. The first tier provides benefits that are essentially equivalent to those available to Social Security beneficiaries, but subject to railroad retirement age and service eligibility criteria. The RRA also provides a second tier of benefits, based entirely on an employee's railroad earnings, that are comparable to private multiemployer pension plans. Tier II provides an additional level of retirement benefits, as well as other benefits, which are not available to Social Security beneficiaries. These include the occupational disability benefit, which is broader than the disability benefit available under Social Security (which is limited to total and permanent disabilities). Tier II also provides supplemental retirement benefits that are available to certain employees who began service prior to October 1, 1981. 45 U.S.C. §231a(b). Eligibility requirements under the RRA differ from Social Security and, in some cases, are more favorable to long–term railroad employees. For example, railroad employees with 30 years of service can retire with unreduced benefits at age 60. 45 U.S.C. §231a(a)(1)(ii).[3]

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[3] Workers covered by the Social Security system are not eligible for an unreduced retirement benefit until between the ages of 66 and 67. 42 U.S.C. §416(l).

As a result of the 1974 legislation, tier II benefits are supported by additional payroll taxes on railroads and their employees that are not levied on Social Security employers and employees. R.R. Ret. Bd., *2017 Annual Report,* at 7 (2017), (available at https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf). The RRTA imposes separate payroll taxes on compensation paid by railroad employers and received by railroad employees to fund each tier of benefits. 26 U.S.C. §3201(a) & (b) (imposing tier I and tier II payroll tax on employees); 26 U.S.C. §3221(a) & (b) (imposing tier I and tier II payroll tax on employers). Tier I tax rates are the same as the Social Security payroll tax rates and fund the benefits that are comparable to Social Security benefits; the receipts from tier I payroll taxes ultimately are transferred to the Social Security and Medicare trust funds through a financial interchange established in 1951. *Railroad Retirement Handbook,* at 3, 46-47.

Separate and distinct tier II payroll taxes fund the benefits that are available to railroad employees but not to Social Security beneficiaries. Tier II taxes have a different earnings base (the maximum amount of earnings that is subject to the tax each year) than tier I taxes, and utilize a different rate for employees and employers, which can fluctuate year to year based on the "average account benefits ratio"—a ratio of fund assets to benefits and expenses. *Railroad Retirement Handbook,* at 46. A separate, additional payroll tax, levied on employers only, funds unemployment and sickness benefits, another aspect of the railroad retirement system that has no Social Security equivalent. *2017 Annual Report,* at 28. Thus, during the course of an employee's employment with a railroad, he or she, and the employing railroad, pay substantially more

payroll taxes than a similarly-situated non-railroad employee and employer.

One aspect of the RRTA that has not changed since 1935 is the definition of compensation; it was limited to "money remuneration" then, as it is today. As discussed above, among the differences between railroad retirement and Social Security is the language used to define "compensation" (in the RRTA) and "wages" (in FICA). These very different definitions were first enacted in 1935 by the same Congress. That same Congress chose to define wages under FICA far more broadly—and specifically to cover nonmonetary payments—than it defined compensation under RRTA. *Compare* 49 Stat. 639 (1935) *with* 49 Stat. 968, 974 (1935).[4] Congress purposefully did so.

B. The Historical Context of the Enactment of the Railroad Retirement and Social Security Statutes Explain the Difference in Each System's Payroll Tax.

The contours of a statute often are shaped by the specific goals that Congress was seeking to accomplish at the time the statute was enacted. The railroad retirement system and the Social Security system both emerged during the great depression of the 1930s, but the circumstances they addressed differed. Social Security was designed to initiate a comprehensive new system to provide retirement and disability income to workers in general, most of whom never had such coverage. However, unlike employers in other industries, many railroads already offered pensions to their

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[4] Congress reenacted the RRTA in 1937 in response to a constitutional challenge, again using the phrase "money remuneration." 50 Stat. 435, 436. *See infra* pp. 12.

employees—the first originating in the 1870s—although the adequacy and financial stability of some was precarious, a situation that was exacerbated by the economic conditions during the 1930s. David B. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 1-2 (1978); *Railroad Retirement Handbook*, at 1. As the economic crisis of the 1930s further weakened the private railroad pension system, support increased for a national pension system. By then, retirement security had become a matter of concern across economic sectors.

The then-proposed Social Security system "did not offer a solution to the problems in the railroad industry." Schreiber at 15, n. 69. It would not begin paying benefits immediately, and would provide no credit for service prior to 1937. *Railroad Retirement Handbook*, at 1. As a result, many railroad pensioners and long-term employees would have been left without benefits. Therefore, Congress elected to establish a separate retirement system for the railroad industry, creating a new federalized railroad pension to be financed by taxes levied on railroads and their employees. *Railroad Retirement Handbook*, at 1-2.

In addition to establishing a single, comprehensive retirement security system, the new statute was intended to facilitate the retirement of many older railroad workers. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573-74 (1979) ("[T]he Act would encourage older workers to retire by providing them with the means to enjoy the closing days of their lives with peace of mind and physical comfort, and so would assure more rapid advancement in the service and also more jobs for younger workers.") (internal quotations omitted). At its inception, the new system became

responsible for making payments to nearly 50,000 railroad pensioners. *Railroad Retirement Handbook*, at 2.

A federal pension had never been established before, especially one designed to replace private pensions. During an era when *Lochner* jurisprudence still prevailed, Congress anticipated constitutional challenges and a Supreme Court that was skeptical of New Deal legislation. Indeed, the first railroad retirement statute was challenged and held to be unconstitutional by this Court. *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935). Nonetheless, the quest to strengthen the retirement income security of railroad workers had taken root, and the effort continued.[5] Ultimately, negotiations between rail labor and management, urged by President Roosevelt, produced a compromise enacted into law as the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937 (renamed the RRTA in 1946. *See* 60 Stat. 722). *See* Schreiber, at 17-21.

The circumstances surrounding creation of the railroad retirement system offer a logical explanation for the different language Congress used when drafting the railroad retirement statute and Social Security statute. Before enactment of these statutes, funding of railroad pension plans typically was based on an employee's base pay, base salary, or regular pay—*i.e.*, based on each employee's *money* remuneration. Railroad employees often received non-money benefits as well, such as food, lodging, and transportation, but the

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[5] A new railroad retirement law was enacted in 1935, structured in a way that Congress hoped would avoid the constitutional infirmities of the original Act. *Railroad Retirement Handbook*, at 2. Nonetheless, this law too was held unconstitutional in part by a district court. *Alton R.R. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

value of those benefits was not used to compute retirement pensions. MURRAY LATIMER, INDUS. PENSION SYS. IN THE UNITED STATES AND CANADA 20-21, 106-12, 133-38 (1932). Additionally, many railroads offered employees stock-purchase plans, not dissimilar to the plans at issue here. Nat'l Indus. Conference Bd., *Studies in Industrial Relations: Employee Stock Purchase Plans* 18-22 (1928 ed.). These too were not included in the calculation of employee pension benefits. *See BNSF Ry.*, 775 F.3d at 755 ("[A]t the time the RRTA was enacted existing railroad pension plans were based on an employee's cash compensation only, rather than on other, broader types of compensation, despite the fact that some railroad companies apparently offered stock-option benefits.") Thus, in devising a program to replace the ailing private railroad pension system, Congress utilized a similar funding method, under which benefits were funded based only on monetary remuneration. *See* Pet. Br. at 26 (explaining how Congress anticipated that taxable "pay roll" would equate with employees' salaries reported to the Interstate Commerce Commission). And Congress has never changed the statute to provide otherwise.

In reading the term "money remuneration" broadly—beyond, by its own admission, what was considered to be money at the time—the court below noted that doing so made "good practical sense" because it created proper incentives for the structuring of compensation packages. Pet. App. 5a. Regardless of whether the court's point has merit as a matter of policy, it is not a judgment that should play a role in the interpretation of clear statutory language. *See Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (when the statutory language dictates otherwise, courts should not construe the statute to advance a presumed policy objective, nor be swayed by policy

concerns that did not appear to motivate Congress at the time).

II. RETIREMENT INCOME SECURITY IS NOT THE ONLY AREA WHERE CONGRESS HAS CHOSEN TO ADDRESS RAILROADS DIFFERENTLY THAN OTHER INDUSTRIES.

A. The Railroad Industry's Industrial Dominance During the First Century of its Existence Led Congress to Enact a Series of Unique Railroad Statutes, Beginning with Economic Regulation.

Echoing the court below, the Government has referred to the RRTA and FICA as "parallel" statutes, but that does not advance its case. Pet. Br. of the United States at 2, 11. On a number of occasions Congress has elected to address a subject in the railroad industry through a different, albeit to some extent parallel, statutory scheme than that used for other industries. As with retirement income security, Congress has taken this approach because it intended to treat railroads differently. Where Congress has done so, instead of striving to construe the statutes the same way, courts should be cognizant of, and give effect to, the differences between those statutes and different language used in parallel provisions of those statutes. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006) (The use of different words, especially in similar statutes, is strong evidence that "Congress intended its different words to make a legal difference.").

Congress has, on more than one occasion, enacted laws specifically aimed at railroads. *Railroad Retirement Handbook,* at 1 (Prior to enactment of the RRA

"[n]umerous laws pertaining to rail operations and safety had already been enacted" and "[s]ince passage of the [RRA], numerous other railroad laws have subsequently been enacted."). Congress has taken this approach in the areas of economic regulation, safety, employer liability, and labor relations. Often, Congress has included both large and small differences in the language of the railroad statutes as the result of deliberate policy choices made in recognition of the industry's unique history and characteristics. Underscoring that point in the context of the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA)—statutes addressing labor relations in the railroad (and airline) industry and industry in general, respectively—this Court admonished that "parallels . . . should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578, n.11 (1971). *See infra* pp. 20-22.

In response to the railroad industry's emergence as the dominant form of interstate commerce in the second half of the nineteenth century, Congress aimed its first effort to comprehensively regulate an industrial sector at the railroad industry. Interstate Commerce Act of 1887, c.104, 24 Stat. 379. This regulatory scheme developed against the backdrop of a common law common carrier obligation, which required railroads to "carry for all persons who applied," at "reasonable" charges, *I.C.C. v. Baltimore & Ohio R.R.*, 145 U.S. 263, 275 (1892), an obligation now incorporated into federal statute. 49 U.S.C. §11101(a); *see also* 49 U.S.C. §10703 ("Rail carriers . . . shall establish through routes . . ."). Indeed, the railroad industry has long been viewed by Congress as a vital and necessary component of national commerce, war-

ranting the imposition of certain obligations, as well as certain protections, as a means of advancing public policy.

Congress has long taken an interest in the economic fortunes of the railroad industry, first through pervasive regulation, and more recently through deregulatory efforts embodied in the Staggers Rail Act, Pub. L. 96-448, 94 Stat. 1895 (1980) and the ICC Termination Act, Pub. L. 104-88, 109 Stat. 803 (1995); *Compare Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) ("The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes.") *with Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 450 (D.C. Cir. 2010) (ICCTA altered the law "entirely in a deregulatory direction").

One area where Congress has singled out railroads—in this case to grant protections—is tax policy. Concluding that historically railroads had been "overtaxed," Congress enacted section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub. L. 94-210, § 306, 90 Stat. 31, 54 (1976); *See Burlington N. R.R. v. Okla. Tax Comm'n,* 481 U.S. 454, 457 (1987). This provision prohibits states from imposing discriminatory taxes on railroads, a widespread and longstanding practice that Congress found "unreasonably burden[ed] and discriminate[d] against interstate commerce." 49 U.S.C. §11501. Congress took note of the particular circumstances facing railroads that made them "easy prey for State and local tax assessors." Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630, at 3 (1969). Interstate rail operations depend on enormous capital investments, which once made are essentially immovable, rendering them captive to the taxing state. *Id.*

Moreover, the normal political restraints that might inhibit excessive and discriminatory taxation did not apply to out-of-state companies like railroads. *Id.* This Court has frequently been called upon to ensure that railroads are able to enforce their rights under §306. *E.g., Ala. Dep't of Revenue,* 562 U.S. 277 (2011); *CSX Transp., Inc. v. Ga. State Bd. of Equalization,* 552 U.S. 9 (2007).

B. Congress Has Chosen to Maintain Different Treatment for Railroads in the Areas of Safety and Employer Liability.

Economic regulation was not Congress' only effort directed uniquely at railroads in the late nineteenth century. To address concerns over safety, Congress enacted a series of laws aimed at discrete hazards posed by railroad operations. *E.g.*, Safety Appliances Act, c. 196, 27 Stat. 531 (1893); Boiler Inspection Act, c. 103, 36 Stat. 913 (1911); *See Johnson v. Southern Pac. Co.,* 196 U.S. 1, 19 (1904) (in four annual messages to Congress, President Harrison implored Congress to take legislative action to address the dangers of coupling rail cars, finally culminating in enactment of the first Safety Appliances Act). These laws prescribed specific requirements for railroad components and locomotives, and remain major components of railroad safety regulation today.

In 1970, Congress went even further when it enacted the Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970), which granted the Secretary of Transportation plenary power to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. §20103(a). The Secretary's authority to promulgate rail safety regulations is delegated to the Federal Railroad Administration (FRA),

an agency within the Department of Transportation. 49 C.F.R. §1.89. Outside the railroad industry, workplace safety is governed by the Occupational Safety & Health Act, which is enforced by the Occupational Safety & Health Administration (OSHA), 29 U.S.C §§651 *et seq.*, an agency within the Department of Labor. Where FRA has exercised jurisdiction over railroads—which includes the areas of track and roadbed, rail equipment and human factors—it displaces regulations issued by the OSHA. *See* Fed. R.R. Admin., *R.R. Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10,584 (1978).

Focus on the safety of railroad employees led Congress to enact another statute directed at the railroad industry. Motivated by a high casualty rate among railroad workers during the early years of the twentieth century, Congress enacted the Federal Employers' Liability Act (FELA) to provide railroad workers who were injured on the job with a tort-based remedy. 45 U.S.C. §§51-60. FELA modified some of the harsher aspects of early twentieth century common law that made recovery difficult for injured workers, such as the assumption of the risk and fellow servant doctrines. H.R. Rep. No. 1386, at 1 (1908); 45 U.S.C. § 54; *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916). FELA also eliminated the prevailing rule that barred recovery entirely if the worker's negligence contributed to the injury, which was replaced with a comparative negligence scheme. 45 U.S.C. § 53.

FELA was a unique statute when it was enacted, and employer liability remains an area where Congress has maintained a different approach to railroads. Shortly after FELA's enactment, individual states began to enact no-fault workers' compensation laws. That conceptually different approach to employer

liability soon became firmly established when its constitutionality was upheld by this Court. *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917). Eventually, all states enacted no-fault workers' compensation laws.[6] In contrast to FELA, under these laws, employees who are injured on the job are entitled to compensation without regard to negligence, their employer's or their own.

Although no-fault workers' compensation laws today apply nationwide to virtually all employers outside the railroad industry, Congress has chosen to leave FELA intact as the exclusive remedy of railroad employees against their employer for workplace injuries, superseding all state laws. *S. Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953); *see Stone v. N.Y., C., & St. L. R.R.*, 344 U.S. 407, 410-11 (1953) (Frankfurter, J., dissenting) (lamenting Congress' decision not to replace FELA with a no-fault system of compensation); *Bailey v. Cent. Vermont Ry., Inc.*, 319 U.S. 350, 358 (1943) (Roberts, J., dissenting) (same). While Congress has for the most part left the subject of employer liability to the states, where it has addressed that subject for non-railroad employees within its jurisdiction, rather than adopt the approach taken for the railroad industry, it has followed the no-fault approach. General Accounting Office, *Workers' Compensation: Selected Comparisons of Federal and State Laws* 1 (April 1996). *See* Federal Employees' Compensation Act, 5 U.S.C. §8101 *et seq.*; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950.

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[6] Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998).

C. Congress Has Chosen to Utilize a Different Approach to Address Labor Relations in the Railroad Industry.

As with employer liability, labor relations—the process of determining whether employees are represented by a union; the negotiating process between employers and unions; the resolution of contract disputes; and the conduct of parties during each phase of the relationship—is governed by a different federal law for railroads than for virtually all other industries. The RLA (which also applies to the airline industry) was enacted in 1926, predating by nearly a decade Congress' decision to address labor relations in industry in general. 45 U.S.C. §§151-162. When Congress did so, by enacting the NLRA, 29 U.S.C. §§151-169, it expressly excluded employees covered by the RLA. 29 U.S.C. §152(2) & (3) (definitions of "employer" and "employee").

As in other areas, history played a role in the different treatment of railroads in the labor area. By the late nineteenth century, unions were well established in the railroad industry, and rail labor and management had had a contentious relationship for several decades prior to enactment of the RLA. *See In re Debs,* 158 U.S. 564 (1895). This included a major strike in 1877 that eventually led to federal intervention, followed by several federal laws aimed at various aspects of rail labor-management relations.[7] The railroads were nationalized during World War I, and when they were returned to private control after the war ended, a new effort to address labor-management

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[7] Arbitration Act, 25 Stat. 501 (1888); Erdman Act, c. 370, 30 Stat. 424 (1898); Newlands Act, c. 6, 38 Stat. 103 (1913); Adamson Act, c. 436, 39 Stat. 721 (1916).

relations in the railroad industry was made in the Transportation Act of 1920. It was widely seen as a failure. *See Chicago & N.W. Ry. Co.*, 402 U.S. at 580. Railroads and their unions then entered into negotiations that eventually led to the passage of the RLA. *See Inter'l Ass'n of Machinists v. Street*, 367 U.S. 740, 758 (1961).

Outside of the railroad industry, labor was less organized. Indeed, courts of that era were perceived as being hostile to organized labor. *E.g., Loewe v. Lawlor*, 208 U.S. 274 (1908) (conduct of union held to be within purview of the Sherman Act). Consequently, the focus of the NLRA differed from the RLA, with the NLRA placing greater emphasis on facilitating, and removing impediments to, the right of labor to organize. In contrast, the RLA emphasizes the obligations to "make and maintain agreements" and "to settle all disputes." *Compare* 29 U.S.C. §151 *with* 45 U.S.C. §152 *First*.

The RLA and the NLRA share some basic goals: granting the right of employees to organize and bargain collectively; prohibiting interference with these rights by employers; and granting the right to negotiate legally enforceable collective bargaining agreements. Each statute establishes an administrative agency—the National Mediation Board (NMB) under the RLA (45 U.S.C. §154), and National Labor Relations Board (NLRB) under the NLRA (29 U.S.C. §153)—to oversee the processes established by each law. The RLA also establishes a National Railroad Adjustment Board to hear disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions that are not resolved through the applicable internal procedures at the railroad. 45 U.S.C. §153 *First* (i).

However, notwithstanding their similar goals and parallel structure, just as is the case with the railroad retirement system and Social Security system, there are significant differences between the RLA and NLRA. The NLRA spells out specific "unfair labor practices," conduct prohibited by management and labor. 29 U.S.C. §158. In contrast, the RLA imposes certain duties on labor and management. 45 U.S.C. §152. For the most part, rights under the RLA are enforceable in court rather than by the NMB, *Chicago & N.W.*, 402 U.S. at 581, while the NLRB has a much greater role in enforcing rights under the NLRA. The RLA and NLRA also set forth different approaches with respect to union elections. *Compare* 45 U.S.C. §152 *Ninth with* 29 U.S.C. §159. Finally, the RLA takes a far more interventionist approach to the resolution of labor disputes than does the NLRA, setting forth a drawn-out process for negotiating new labor agreements that must be followed before the parties may resort to self-help. *See* 45 U.S.C. §§155 *First*; 156; 160.

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Given the historical context in which RRA/RRTA and SSA/FICA were adopted, it is no surprise that Congress chose to enact different statutory retirement systems for railroads and employers in general, and that among the differences is the approach to the payroll taxes that fund the respective systems. There is no question that Congress made the choice to define the two different terms "compensation" and "wages" differently, using narrower language in the RRTA that demonstrates an intent not to tax all forms of remuneration that a railroad employer might confer on its employees. Instead, as evidenced by the plain language used, Congress chose to limit such taxation

to any form of *money* remuneration, consistent with how railroad pensions were calculated at the time.

The starting point for the interpretation of a statute is always its language. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). The court below ignored the clear differences in the statutory language in order to achieve the similar treatment that it assumed Congress intended. This Court should not follow suit. Rather, this Court should take Congress' decision to use plainly different statutory language as indicative of Congress' intent to achieve different treatment under the two statutes, just as Congress has in its treatment of railroads in many other areas.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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